84-1596

No. .....

Office - Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS
CLERK

In The
Supreme Court of the United States
October Term, 1984

RICHARD VIRGIL BIBBERO, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PATRICK SARSFIELD HALLINAN
WILLIAM L. OSTERHOUDT
HALLINAN, OSTERHOUDT & POPLACK
345 Franklin Street
San Francisco, CA 94102
Telephone: (415) 861-1151
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

44pp

QUESTION PRESENTED FOR REVIEW

Whether reversal of Petitioner's conviction is required where the government failed to prove the existence of the conspiracy charged in the Indictment, subjecting Petitioner to substantial prejudice?

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	4
REASON FOR GRANTING THE WRIT:	
PETITIONER'S CONVICTION MUST BE REVERSED WHERE THE GOVERNMENT FAILED TO PROVE THE EXISTENCE OF THE CONSPIRACY CHARGED IN THE INDICTMENT, SUBJECTING PETITIONER TO SUBSTANTIAL PREJUDICE.	8
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:

Kotteakos v. United States, 328 U.S. 750 (1946) 9, 11, 15

United States v. Abushi, 682 F.2d 1289 (9th Cir. 1982) 15

United States v. Albelaez, 719 F.2d 1453 (9th Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 3543 (1984) 14

United States v. Baxter, 492 F.2d 150 (9th Cir. 1973) 11, 12

United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) 15, 17

United States v. Block, 696 F.2d 1213 (9th Cir. 1982) ... 15

United States v. Dunn, 564 F.2d 348 (9th Cir. 1977) 14

United States v. Durades, 607 F.2d 818 (9th Cir. 1979) 12, 13

TABLE OF AUTHORITIES—Continued

Page

United States v. Griffin, 464 F.2d 1352 (9th Cir. 1971), *cert. denied*, 409 U.S. 1009 (1972) 13

United States v. Heath, 580 F.2d 1011 (10th Cir. 1978) 15

United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981) 9, 11

United States v. Knight, 416 F.2d 1181 (9th Cir. 1969) 14

United States v. Levine, 546 F.2d 658 (5th Cir. 1977) ... 10

United States v. Netter, 570 F.2d 547 (5th Cir. 1978) 10

United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980) 13

CONSTITUTION:

United States Constitution, Fifth Amendment 2

RULES:

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 8 2

Rule 12 2

STATUTES:

18 U.S.C. Section 3500 8

21 U.S.C. Section 841(a) (1) 2, 3

21 U.S.C. Section 841(b) (6) 2, 3

21 U.S.C. Section 846 2

21 U.S.C. Section 952 ..... 2, 3

21 U.S.C. Section 960 ..... 2, 3

21 U.S.C. Section 963 ..... 2, 3

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1291 2

28 U.S.C. Section 1293(1) 2

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1984

—o—

RICHARD VIRGIL BIBBERO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

Petitioner, Richard Virgil Bibbero, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered December 14, 1984.

—o—

OPINION BELOW

The Ninth Circuit Court of Appeals entered its published opinion on December 14, 1984. That opinion is set out in Appendix "A." Said opinion has been reported at 749 F.2d 581. The Court of Appeals denied Petitioner's timely Petition for Rehearing on February 8, 1985, a copy of said Order being appended hereto as Appendix "B."

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1). The United States Court of Appeals had jurisdiction under Title 28 United States Code, Sections 1291 and 1293(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The statutes involved are Rules 8 and 12 of the Federal Rules of Criminal Procedure, and 21 United States Code, Sections 841(a) (1), 841(b)(6), 846, 952, 960 and 963, the pertinent text being set forth in Appendix "C."

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Southern District of California on August 3, 1982 in a three count indictment. Count I charged Petitioner and twenty-six other defendants with conspiracy to knowingly and intentionally possess with intent to distribute a quantity of marijuana exceeding 1,000 pounds, in violation of 21 U.S.C. Section 841(a) (1), 841(b) (6), and 846. Count II, alleging the same unlawful combination as Count I, charged Petitioner and the twenty-six others with conspiring to import the marijuana in violation of 21 U.S.C. Sections 952, 960, and 963. Count III charged Petitioner and twelve other defendants with possession with intent to distribute 3,000 pounds of marijuana in violation of 21 U.S.C. Section 841(a) (1). Prior to trial, Petitioner moved for severance of his trial from that of his co-defendants, in part on the basis that the conspiracy charges contained in the indictment were improperly pled, having improperly charged as one conspiracy what in truth were several separate conspiracies. That motion was denied.

On January 18, 1983, Petitioner, with one co-defendant, James Marshall, proceeded to trial. Between January 18, 1983, and February 2, 1983, the trial of the case was held. On February 3, 1983, Petitioner was convicted on all three counts. Judgment was pronounced on March 14, 1983, and a timely appeal was taken to the Court of Appeals for the Ninth Circuit.

On December 14, 1984, Petitioner's convictions were reversed on other grounds by the Court of Appeals in a published opinion. With respect to the multiple conspir-

acy issue, however, the court below held that the evidence was sufficient to prove the one central conspiracy charged and Petitioner's connection with it. Petitioner respectfully asks this Court to issue a writ of certiorari to review that decision by the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE FACTS

The government's case in the trial court rested primarily on the testimony of three informants: Louis Villar, Allen Logie and Donald McMichael. All three were criminally implicated in this case and exchanged testimony against the defendants for leniency, financial reward and other amenities.

The chief witness was Louis Villar, a former high school Spanish teacher from Coronado, California [RT: 5:897] who quit his job in 1972 to begin smuggling marijuana. [RT:7:1235] He did so initially in partnership with Ed Otero and Lance Weber. They called themselves the "Coronado Company." [RT:5:902] Villar testified that nine loads of various kinds of contraband were brought into the United States at his behest during the period 1975-1982. A brief review of these operations is necessary to an understanding of the multiple conspiracy question presented.

The first load, in October 1975, was comprised of 15 tons of marijuana brought into the country by boat (captained by Daniel Blocker) and off-loaded at Malibu, California. [RT:5:898] Numerous people were employed

to assist in the off-loading and distribution, many of whom were former Spanish students of Villar's. [RT:7:1230-1232] This entire load was owned by the Coronado Company.

In April 1976, 20 tons of marijuana were off-loaded at Malibu. [RT:5:906-907] The captain of the boat on this load was also Daniel Blocker. [RT:5:910] The load originated in Mexico [RT:5:911-912] and "basically the same" beach crew was used to unload it. One-half the load was distributed to Michael Sexton by Villar. [RT:5:913]

A third operation occurred in December 1976. [RT:2:162] This was based on an entirely different formula than the first two. A former student of Villar's, Robert Lahodny, asked if Villar and his crew could off-load "Thai stick" marijuana which Lahodny would bring into the United States. [RT:5:915] Lahodny had suppliers in Thailand named Dennis, Michael and Lux [RT:5:918] who would arrange for the marijuana. Villar agreed to supply the off-load crew in exchange for a percentage of the load, with Lahodny and his supplier retaining ownership of the remaining amount. Lahodny supplied the boat and the boat crew. [RT:5:917] The marijuana (one and one-half tons of Thai sticks) was unloaded at Juan Creek, California. This venture varied substantially from the first two operations in that the "Coronado Company" was responsible only for off-loading the shipment, in exchange for 35% of the contraband. Lahodny, meanwhile, maintained his ownership interest in the remaining 65%.

In May, 1977, Villar, Otero and Weber arranged a fourth load, (this time consisting of hashish) which was

off-loaded at Machias, Maine. [RT:2:183] This contraband was owned exclusively by the Coronado Company.

Around October 15 to 27, 1977, load five, seven tons of Thai marijuana was landed in Machias, Maine. [RT:2:197;207] The supplier was one Warren Anderson. [RT:2:201] The Coronado Company was paid 35% of the load in exchange for arranging for shipment and off-loading. [RT:6:950,954] In this case, Anderson kept 65-70% of the load. The Coronado Company, had essentially a transportation and off-loading "contract" with him, for which they were to receive 30-35% of the marijuana.

Significantly, just prior to this fifth load, the "Coronado Company" dissolved. Lance Weber left and Bob Lahodny joined, by buying into the fourth (Morrocan hashish) load. [RT:2:204-205] Villar testified it was his intention to in fact form *a new company.* [RT:6:946]

The sixth load executed by the Coronado Company was particularly significant in two respects. First, this venture signified the first time the Coronado Company entered into a *joint venture arrangement* with suppliers of contraband. Bill and Ben Underwood, and the Coronado Company, each owned portions of the load at the *outset* of the venture. (In addition, the Coronado Company provided transportation and off-loading services.) This entire load was lost, and the numerous members of the Coronado Company apprehended and prosecuted in the process. Villar escaped arrest as he was on his estate at Hilton Head, South Carolina, at the time. [RT:6:967] Most of the employees left the Coronado Company after the arrests in Maine and a San Diego indictment. [RT:4:527-529;7:1306-1308]

Nevertheless, in May or June 1979, a seventh load, this time Thai marijuana, was landed at Bear Harbor, California [RT:2:234-236]. Lahodny's boat, (the "Pai Hui"), was used for transportation. This load also involved a joint venture, Don Moody and John Hollenbeck owning one-half of the load and the Coronado Company owning the other half. In addition the Coronado Company again provided transportation and off-loading services.

The eighth load, which occurred in late 1979, represents Petitioner's first appearance in connection with the Coronado Company. Petitioner allegedly owned the entire load, with the Coronado Company providing transportation and off-loading services in exchange for a percentage of the contraband.

The eighth load was landed at Neah Bay in Washington and was a disaster. Due to weather conditions and an accident with a truck, the majority of the load and the off-loading equipment was abandoned on the beach. The crew fled to avoid arrest. [RT:2:270-274;304-309]

The ninth and final operation involving the Coronado Company, a four-ton load of Thai marijuana, was landed at Bear Harbor, California, in October 1981. [RT:3:355] An equipment house was rented in Leggett, California [RT:3:349] and a house was rented in Arcata to be used to reweigh and package the marijuana. [RT:3:357] Villar testified half this load belonged to Bibbero and half to the Coronado Company, which received a portion of the load for providing transportation and off-loading serv-

ices. Petitioner testified at his trial, denying any criminal involvement in these operations.[1]

———o———

REASON FOR GRANTING THE WRIT

Petitioner's Conviction Must Be Reversed Where The Government Failed To Prove The Existence Of The Conspiracy Charged In The Indictment, Subjecting Petitioner To Substantial Prejudice.

It is Petitioner's position, and has been throughout the proceedings in this case, that a material variance existed between the indictment and the proof at trial, which served to deny him a fair trial requiring reversal of his conviction.

Noting that "[t]he question of whether a single conspiracy has been proved, rather than multiple conspiracies . . . is essentially a question of the sufficiency of the evidence,"[2] the Court of Appeals found that a jury could rationally conclude that the "Coronado Company engaged

---

[1]While mindful of the rule assuming facts favorable to the government when there is a contention that evidence is insufficient to support a conviction, we must also point out that Petitioner's conviction was reversed by the court below because crucial material bearing on Villar's credibility, producible under 18 U.S.C. § 3500, was improperly withheld at trial, and because prejudicial and damaging hearsay statements were erroneously admitted in evidence against him. Under these circumstances, we suggest that the rule crediting the government's proof in sufficiency cases is of less force.

[2]Opinion of the Court (hereafter Opinion), p. 9, lines 21-24.

in the continuing conspiracy alleged in the indictment,"[3] and that Bibbero became a member of that conspiracy.[4] The Court arrived at its decision by a two step analysis, considering first whether "members of the Coronado Company" conspired as alleged to import and distribute marijuana from 1977 through mid-1981, and secondly (having answered the first question affirmatively) whether Petitioner was a member of that (Coronado Company) conspiracy. We believe that the Court misapprehended both the nature of the conspiracy charged in the indictment and the record concerning Petitioner's actual position in the case.

To establish the existence of a single conspiracy, rather than a cluster of separate conspiracies, the government must prove not only that there is a central "hub" (in this case the Coronado Company) dealing with numerous "spokes," but also that the various "spokes" are bound by a "rim." That is, the government must show an overall agreement which existed between all the alleged coconspirators. *Kotteakos v. United States,* 328 U.S. 750 (1946); *United States v. Kenny,* 645 F.2d 1323, 1334-35 (9th Cir. 1981).

As stated by the *Kenny* court:

> "The nature of that 'rim' defies precise statement, but general principles are well established. The evidence must show that each of the defendants was involved. *United States v. Beecroft* (9th Cir. 1979) 608 F.2d 753. A meeting of the minds must be demonstrated. *United States v. Peterson* (9th Cir. 1977)

---

[3]Opinion 13:10-11.

[4]Opinion 14:8-9.

549 F.2d 654. Mere association and activity with a conspiracy is insufficient. *United States v. Basurto* (9th Cir. 1976) 497 F.2d 781, 793." 645 F.2d at 1334.

For a wheel conspiracy to exist, those people who form the wheel's spokes must have been aware and must do something in furtherance of some single, overall illegal enterprise. *United States v. Levine,* 546 F.2d 658, 663 (5th Cir. 1977). There must be a substantial identity of acts or participants to provide the rim. See *United States v. Netter,* 570 F.2d 547, 552 (5th Cir. 1978).

The essential flaw in the approach of the Court of Appeals is that it incorrectly identifies the overall conspiracy charged in this indictment as one among "members of the Coronado Company." The single conspiracy alleged did *not* consist of the Coronado Company, and was not confined in any way to its members. On the contrary, the charged conspiracy embraced twenty-seven named defendants, among whom one can count no more than three who were ever arguably "members" of the Company at any time. Of course, as one knows from the evidence, the alleged conspiracy also included the Company founder Villar and the sometime member Lance Weber, but for the most part it consisted of persons like Appellant Bibbero who, while not Company members in any sense, allegedly *contracted* for the Company's serv ices in aid of their own separate and independent smuggling ventures.

The critical point is that these independent contractors had no relationship whatever with one another; they each dealt separately with the Company, for different services at different times, for their own individual and

immediate benefit.[5] That is why Petitioner has argued throughout these proceedings that the case presents in reality a classic *Kotteakos*[6] conspiracy: a *hub* (the Coronado Company, in its different incarnations over the years) with spokes (the various persons and joint-venturers who contracted with the Company to move and transport their marijuana) which are *not* bound together by a *rim* of any sort. *United States v. Kenny,* 645 F.2d 1323, 1334-35 (9th Cir. 1981). It was precisely the failure of the government to establish such a rim (i.e., a relationship among and between the various clients of the Company) which created a fatal variance, or, under the Ninth Circuit's formulation, a failure of proof. For what remained at the close of the evidence was proof not of the overall "hub" conspiracy alleged, but proof instead of a number of small conspiracies between the Company and each of its various clients.

In saying this we are mindful of the one circumstance which may sustain a "hub" conspiracy in the absence of a relationship between its spokes, namely that which obtained in *United States v. Baxter,* 492 F.2d 150, 158-159 (9th Cir. 1973), where the Court remarked:

---

[5]The record of the Coronado Company's nine (not six, as the opinion below mistakenly states) smuggling ventures clearly establishes this relationship with the other persons involved in these operations. On page 12 of Appellant's Reply Brief there appears a chart of these nine ventures demonstrating that these "loads" varied widely as to the participants. Only rarely was a load entirely owned by the Company. Most were owned either jointly or exclusively by other individuals. In no instance did these separate owners of different loads enter into a joint relationship with each other. Their only point of contact was with the Company, who performed transportation and/or off-loading services in exchange for a negotiated percentage of the load.

[6]*Kotteakos v. United States,* 328 U.S. 750 (1946).

> ". . . even though the defendant retailers did not directly conspire with each other in this over-all undertaking, if each knew, or had reason to know, that other retailers were involved with the Hernandez organization in a broad project for the smuggling, distribution and retail sale of narcotics, and had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture, the jury could find that each had, in effect, agreed to participate in the over-all scheme. *See, Blumenthal v. United States,* 332 U.S. 539, 557-558, 68 S.Ct. 248, 92 L.Ed. 154 (1947); *United States v. Friedman,* 445 F.2d 1076, 1080 (9th Cir. 1971); *Daily,* 282 F.2d at 820. This would be true even though the individual defendants were not aware of the identity, number or location of the other participating retailers. *See, Friedman,* 445 F.2d at 1080."

The record in the instant case is utterly bereft of evidence which would bring it within the *Baxter* analysis. In fact, what is clear from the record below is that the individual clients who in effect hired the Coronado Company personnel to transport or off-load their smuggled marijuana had absolutely no reason to know that others similarly situated were involved in a "broad project" for smuggling and distributing drugs, or that the benefits they derived from their arrangements with the Company were in any way dependent upon the success of some "entire venture" beyond their own. On the contrary, the "hub" Company dealt with each "spoke" client on an individual basis. The success or failure of each such venture had nothing to do with any other venture or combination thereof, but rather depended upon such variables as the client's source of supply, the skill of the Company's off-loading or transporting arrangements and, of course, luck and weather. *United States v. Durades,* 607 F.2d 818 (9th Cir. 1979).

Indeed, the fact that the fifth and eighth loads were unsuccessful, and the crews apprehended and prosecuted, speaks to the fact that the success of each individual load was clearly *not dependent* on the success or failure of any other venture, and that an individual client-importer would have no reason to believe that the success of the venture in which he was involved, was, to any degree, dependent on the success of other ventures undertaken by the Coronado Company.

The operations differed widely in methodology and the identity of participants, occurred at different times (often months and even years apart), and in different geographical areas. See *United States v. Zemek,* 634 F.2d 1159, 1168 (9th Cir. 1980). Thus, there is no basis to conclude that the spokes of this conspiracy bore any relation to each other based upon mutual dependence. See also, *United States v. Durades,* 607 F.2d 818 (9th Cir. 1979) (knowledge of a larger conspiracy not imputed from knowledge that one is dealing with a large-scale trafficker); *United States v. Griffin,* 464 F.2d 1352 (9th Cir. 1971), *cert. denied,* 409 U.S. 1009 (1972).

The Court of Appeals' mischaracterization of the charged conspiracy as one consisting of the Coronado Company, rather than one having the Company as its hub, prevented the Court from focusing on and considering the *Kotteakos* argument of Petitioner. As long as the only question was perceived as whether the members of the Company engaged in an over-all marijuana conspiracy over the years, it was not necessary to consider the relationship of the various client-importers to the Company, or to each other, and the Court undertook no such analysis in determining whether the *charged* conspiracy, one em-

bracing the Company *and* essentially everyone who contracted with it, had been established.

Having answered the wrong question, that is, having decided that the members of the Coronado Company did engage in a continuing conspiracy during the years covered by the indictment, the Court had only to decide whether Petitioner knowingly joined that conspiracy. This is always a question inherently weighted in the government's favor both by the rule that only a *slight connection* is needed to find a defendant has joined an existing conspiracy, *United States v. Dunn,* 564 F.2d 348, 357 (9th Cir. 1977), and by the old principle that one who joins such a conspiracy is "bound by all that has gone before in the conspiracy, even if unknown to him." *United States v. Knight,* 416 F.2d 1181, 1184 (9th Cir. 1969). We believe that the Court of Appeals should not even have reached this question, and would not have done so had it properly identified the conspiracy charged and focused on whether *that* conspiracy, with the Coronado Company not as its essence but as its hub, had been proven. If no such conspiracy was proven, there was obviously no occasion to decide whether Petitioner Bibbero, or anyone else had joined it.

The question remains whether, given our premise that the Court of Appeals erred in holding that the evidence supported the conspiracy charge in the indictment, Petitioner must further show that he was prejudiced by the variance in order to be entitled to a reversal of his conviction. We believe that the Ninth Circuit was correct in its formulation of the multiple conspiracies issue as one of the sufficiency of evidence. See, *e.g., United*

States v. Albelaez, 719 F.2d 1453, 1457 (9th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 3543 (1984); *United States v. Block,* 696 F.2d 1213, 1215 (9th Cir. 1982); *United States v. Abushi,* 682 F.2d 1289, 1293 (9th Cir. 1982). Under that formulation, it is clear that a conviction based on legally insufficient evidence must be reversed, and the indictment dismissed, without any inquiry concerning prejudice.

However, even if this Court were to conclude that, under a traditional "fatal variance" analysis, one in Petitioner's position must show that the variance between pleading and proof prejudicially affected his substantial rights, such a showing is clearly present in this case.

The most apparent prejudice to which Appellant was subjected by virtue of the variance was the "transference of guilt from members of one conspiracy to members of another which inheres in such a situation." See, *Kotteakos v. United States, supra,* 328 U.S. at 774. Moreover, this possibility of prejudice increases with the number of defendants tried and the number of conspiracies proven. *United States v. Heath,* 580 F.2d 1011, 1033 (10th Cir. 1978). It was with a view to this prejudice that Petitioner moved, prior to trial, for a severance. In fact a number of conspiracies were proven.

> "Numbers are vitally important in trial especially in criminal matters."
>
> *Kotteakos v. United States, supra,* 328 U.S. at 772.
>
> "While defendants are easily counted, conspiracies are less readily computable."
>
> *United States v. Bertolotti, supra,* 529 F.2d 149, 156 (2d Cir. 1975).

In the instant case, the trial court had made clear on a number of occasions that it would not permit the introduction of any evidence concerning loads prior to January, 1977, the start-up date of the conspiracy counts alleged in the indictment, in the trial in this case. Specifically, the court noted during the course of the motions hearing the following:

> "The Court can see whereby there might be certain things that happened prior to 1977 that may be relevant. I can't say that, as a matter of law, nothing can come in. However, the indictment charges a conspiracy that starts in 1977 and that statement in the paperwork that the Government looks at it as one continuous conspiracy and therefore wants to draw acts from 1973, isn't allowed by the Court. Before any—incidents, evidence, matters, pertaining to any of these defendants or the alleged prior conspiracy will be allowed to be introduced in the trial, the Government must prepare in writing a written statement of what it is that they want to introduce the witnesses thereon and the reason for its admission." [RT 64]

At no juncture did the government ever submit any such statement justifying the admission of the earlier conduct objected to. Furthermore, the Court explicitly recognized the obvious prejudice from the admission of this evidence in noting the following:

> "I want to make clear, however, that I will be strictly interpreting the allegations of this indictment; since the Grand Jury says it's January, that's the conspiracy I am looking at. Secondly, I don't want the jury to get confused about—or prejudiced or to spend a great deal of time litigating a 1973 through '76 conspiracy." [RT 64-65]

Thus, it is clear that substantial prejudice, *said prejudice being clearly recognizable to the court*, nevertheless

was permitted to totally invade the trial process through the admission of the evidence of loads, *both before and during the time periods alleged in the indictment*, with which Petitioner was in no way associated. The error in the admission of said evidence was clearly prejudicial, and requires the reversal of Petitioner's conviction.

As noted by the Court in *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975) the:

> ". . . possibilities of spill-over effect from testimony on [unrelated] transactions are patent when the number of conspiracies, the number of defendants and the volume of evidence are weighed against the ability of the jury to give each defendant the individual consideration our system requires.
>
> • • •
>
> "Criminals they may have been, but their guilt did not permit violation of their right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others." 529 F.2d at 157.

Here, of course, that spill-over effect was already aggravated by the government's determination to bring in evidence of matters which occurred even prior to the allegations in the indictment.

In conclusion, Petitioner submits that the evidence was insufficient to support his conviction and further, if necessary, that the variance between the conspiracy charged and the government's proof at trial was highly prejudicial.

CONCLUSION

For the foregoing reasons Petitioner respectfully urges that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment of that Court.

Dated: April 3, 1985

Respectfully submitted,

PATRICK SARSFIELD HALLINAN
WILLIAM L. OSTERHOUDT
HALLINAN, OSTERHOUDT & POPLACK
345 Franklin Street
San Francisco, CA 94102
Telephone: (415) 861-1151

Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 83-5073

USDC CR 82-0572-K

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD VIRGIL BIBBERO, JR.,

Defendant-Appellant.

NO. 83-5074

UNITED STATES OF AMERICA,

v.

JAMES PAUL MARSHALL,

Defendant-Appellant.

OPINION

(Filed December 14, 1984)

Submitted December 5, 1983

Appeal from the United States District Court
for the Southern District of California

Honorable Judith N. Keep, United States District Judge, Presiding

Before: FLETCHER and NELSON, Circuit Judges, and HARDY,* District Judge.

HARDY, District Judge:

Richard Virgil Bibbero, Jr. and James Paul Marshall were convicted in a jury trial of various drug smuggling charges. On appeal, they raise issues concerning proof of the alleged conspiracy, non-disclosure of relevant information held by the government, and admission of certain evidence. We hold that defendants were entitled to disclosure of certain additional material held by the government and that hearsay testimony of a co-conspirator was erroneously admitted. For these reasons we reverse and remand.

I. FACTS

The evidence, considered in the light most favorable to the government, proved the following sequence of events:

In 1972, Louis Villar, Edward Otero, Paul Acree, and Lance Weber agreed to work as partners for the purpose

---

* Honorable Charles L. Hardy, U.S. District Judge for the District of Arizona, sitting by designation.

of smuggling and distributing marijuana. This partnership became known as the Coronado Company. In its early years, this partnership conducted smuggling operations on a relatively small scale. As the size of the loads increased, employees were hired to help with the off-loading part of the operation. In 1977, Bob Lahodny joined the Company, replacing Weber as a partner.

Late in 1979, the Company began to plan a fifth smuggling operation. Lahodny contacted a previous supplier, Lux Phaksuwana, and his associate, defendant Bibbero, about procuring a load of Thai marijuana. In a series of meetings at Santa Barbara and San Francisco, Bibbero met with the partners of the Company to discuss the operation. It was agreed that Bibbero would buy seven tons of marijuana and ready it for shipment to the United States. The Company would oversee the transporting of the load to Neah Bay, Washington, and land the shipment by helicopter for warehousing and distribution. The financial terms of this agreement were that Bibbero and the Company would each pay 50% of the cost of the supply, and Bibbero and the Company would receive 40% and 60% of the load respectively.

After a series of mishaps, the off-loading operation was abandoned with only one ton of the load safely landed and warehoused. Six tons of marijuana were recovered by Drug Enforcement Administration (DEA) agents on the shores of Neah Bay. Bibbero successfully renegotiated the division of the salvaged marijuana and received 45% of the load.

During the spring and summer of 1981, Bibbero met Villar and other partners at Santa Barbara, Palo Alto, and LaCosta, California, to plan a sixth smuggling opera-

tion. Because of the debacle at Neah Bay, it was agreed that Bibbero would receive more than half of the load. Bibbero also succeeded in getting a friend, Joe Siegfried, onto the off-loading crew so that Bibbero could maintain closer contact with the off-loading operation. The landing was planned for Bear Harbor, California. Marshall was recruited to work as a crew member and arrived at the site several weeks early to help prepare for the off-loading operation.

When the boat transporting the marijuana had engine trouble near Japan, Bibbero loaned the Company $25,000 to cover the cost of repairs and was scheduled to receive 100% interest on this loan.

A six-ton load was successfully landed at Bear Harbor in October, 1981, and transported to a house at Arcata, California, where it was weighed and packaged. Marshall participated in the off-loading. Bibbero stayed at a hotel in Eureka during the operation. He later arrived at the Arcata house with Siegfried, congratulated the crew members, and departed. Sometime after the operation was completed, Lahodny hosted a victory party, which was attended by Bibbero and Marshall.

On August 3, 1982, a federal grand jury in the Southern District of California returned a three-count indictment against Bibbero, Marshall, and twenty-five other individuals pertaining to the drug smuggling operation. Count one charged Bibbero, Marshall, and twenty-five others with conspiracy to possess marijuana, exceeding 1000 pounds, with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6), and 846 (1982). Count two charged the same individuals with conspiracy to im-

port marijuana with intent to distribute in violation of 21 U.S.C. §§ 952, 960, and 963. Count three charged Bibbero and twelve others, not including Marshall, with possession of 3000 pounds of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

The district court divided the twenty-seven defendants into three groups and ordered three separate trials. The defendants were tried as a separate group, and judgments were entered after the jury found Bibbero and Marshall guilty as per the indictment. The defendants filed a timely appeal from the district court's judgment order.

II. THE ADMISSION OF CO-CONSPIRATOR VAUGHAN'S OUT-OF-COURT STATEMENT

On direct examination, government witness Allen Logie testified that he participated in the sixth smuggling operation as the off-loading equipment manager. He specifically testified that when he arrived at the Arcata house where the marijuana was being weighed and packaged, he saw Bibbero and Siegfried. Logie left the house to drive some equipment to a storage site in Novato, California, and when he returned Siegfried was loading the boxes of marijuana into his truck but Bibbero was gone. Over the objection of Bibbero's counsel, Logie testified that Vaughan then told him that the marijuana that Siegfried was loading "belonged to little Rick [Bibbero]." This statement was admitted on the basis that it was made "by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). The trial court concluded that the statement may have been made to further the distribution of marijuana.

Bibbero contends that Vaughan's statement was inadmissible because it did not further the conspiracy. We agree with the defendant. To come within the co-conspirator exception, the evidence must indicate that the statement furthered the common objectives of the conspiracy; "mere conversation between conspirators" is not admissible. *United States v. Fielding,* 645 F.2d 719, 726 (9th Cir. 1981); *United States v. Eubanks,* 591 F.2d 513, 520 (9th Cir. 1979). On voir dire conducted by defense counsel, Logie virtually acknowledged that Vaughan's statement was idle conversation.[1] Because of Logie's limited responsibilities as equipment manager, Vaughan's statement of ownership was immaterial to him. Logie confirmed that the information did not affect his conduct afterward. The government stresses that Logie also testified that while the marijuana was being weighed and repackaged Vaughan was entering box numbers onto an accounting ledger. This fact, while relevant to our inquiry, does not change our conclusion. The fact that Vaughan was laboring on behalf of the conspiracy when he spoke to Logie does not require the conclusion that his statement furthered the conspiracy. Rather, the evidence clearly indicates that Vaughan was merely informing Logie of the marijuana's ownership without any intent to further the conspiracy.

Having determined that Logie's testimony should not have been admitted, we must now consider whether this error requires reversal of the verdict against Bibbero. This court has held that "if the hearsay does not fall into an exception it is conclusively unreliable" for the purposes of the Confrontation Clause of the sixth amendment. *See United States v. McKinney,* 707 F.2d 381, 384 (9th Cir.

1983) (footnote omitted). We are considering, therefore, the magnitude of a constitutional error and, accordingly, the verdict must be reversed unless the error was harmless beyond a reasonable doubt. *Id.* at 384-85; *United States v. Hollingshead,* 672 F.2d 751, 755 (9th Cir. 1982).

The evidence of Bibbero's guilt was formidable but not overwhelming, and Vaughan's statement that Bibbero owned a share of the marijuana was important to the government's case. Bibbero took the stand and presented the defense that he did not participate in the conspiracy. He confirmed the testimony of Villar and Logie that he was present when the conspirators carried out the sixth smuggling operation, but he insisted that he gained the opportunity to witness the operation after learning that his friends were smugglers and did so only as a curious bystander. In view of this defense, evidence of Bibbero's actual participation was important. As the principal witness, Villar testified Bibbero's involvement in various phases of the conspiracy. The government sought to corroborate Villar's testimony about Bibbero's actual participation with only two pieces of evidence: another government witness's identification of Bibbero in Thailand and Vaughan's statement that Bibbero owned a share of the marijuana. The identification was unsuccessful. Thus, the only corroborating evidence of Bibbero's participation was Vaughan's statement. In view of the importance of this statement to the government's case, it cannot be concluded beyond a reasonable doubt that the error of ad-

mitting this evidence did not affect the verdict. Therefore, the verdict against Bibbero must be reversed.

III. DISCOVERY OF JENCKS ACT MATERIAL

The Jencks Act provides that

> [a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

18 U.S.C. §3500(b). Discovery of the witness' statement may not be compelled until the witness has testified. *United States v. Spagnuolo,* 515 F.2d 818, 821 (9th Cir. 1975). When the statement must be produced, the government may request the court to inspect the statement in camera and excise any irrelevant material. 18 U.S.C. §3500(c).

Before trial the government produced for the defendants a copy of a DEA report based upon interviews with government witness Villar. This original version was severely censored with approval of the trial court to protect an on-going investigation by the DEA. Early in the trial and before Villar testified, the government produced a second version of the report containing fewer but still many excisions. Defense counsel strenuously objected to this form of discovery, contending that it violated the Jencks Act. After Villar testified, defense counsel renewed their objection. The trial court directed the government to produce a third version revealing all information relevant to Villar's testimony. The government apparently intended at this point to release the report sub-

stantially unexcised; however, a third version was never received by defense counsel.[2]

On appeal the defendants contend that the government violated the Jencks Act by producing only the second version of the DEA report. We agree. There are no exceptions to the Jencks rule that all statements relevant to the subject matter of the witness' testimony must be produced after direct examination of the witness. *See Ogden v. United States,* 303 F.2d 724, 739-40 (9th Cir. 1962) *cert. denied* 376 U.S. 973 (1964). The statement need relate only generally to the events and activities testified to by the witness to come within its sweep. *Id.* A review of Villar's testimony and comparison of the second version with the original report indicates that substantial, deleted portions of the original are generally relevant to Villar's testimony. It is not for the courts to speculate whether the omitted portions could have been used effectively at trial. *Goldberg v. United States,* 425 U.S. 94, 111 n.21 (1976). We conclude that the substantive rights of both defendants have been violated and, accordingly, reverse their convictions.

IV. SUFFICIENCY OF THE EVIDENCE

Even though we reverse on procedural grounds, double jeopardy principles require us to consider another contention.

Bibbero contends that there was a prejudicial variance between the single overall conspiracy charged in the indictment and the proof, which in his view established multiple conspiracies rather than just one overall conspiracy. The question of whether a single conspiracy has been

proved, rather than multiple conspiracies, is a recurring one, which is essentially a question of the sufficiency of the evidence. *See, e.g., United States v. Albelaez,* 719 F.2d 1453, 1457 (9th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 3543 (1984); *United States v. Bloch,* 696 F.2d 1213, 1215 (9th Cir. 1982); *United States v. Abushi,* 682 F.2d 1289, 1293 (9th Cir. 1982); *United States v. Kaiser,* 660 F.2d 724, 730 (9th Cir. 1981), *cert. denied,* 455 U.S. 956, 457 U.S. 1121 (1982), *overruled on other grounds, United States v. DeBright,* 730 F.2d 1255 (9th Cir. 1984) (en banc); *United States v. Kenny,* 645 F.2d 1323, 1335 (9th Cir.), *cert. denied,* 452 U.S. 920, 454 U.S. 828 (1981).

An appellate reversal of a conviction on the basis of insufficiency of the evidence has the same effect as a judgment of acquittal: the Double Jeopardy Clause precludes retrial. *See Tibbs v. Florida,* 457 U.S. 31, 41 (1982); *Burks v. United States,* 437 U.S. 1, 18 (1978). The existence of other grounds for reversal does not avoid the necessity of reviewing the sufficiency of the evidence. As noted by Justice Brennan in his concurrence in *Justices of Boston Municipal Court v. Lydon*:

> [W]hen a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not, consistent with *Burks v. United States,* [437 U.S. 1 (1978)], ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial. Because the first trial has plainly ended, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided: if retrial is to be

> had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."

— U.S. —, 104 S.Ct. 1805, 1820-21 (1984) (Brennan, J., concurring) (quoting *Tibbs v. Florida*, 457 U.S. 31, 51 (1982) (White, J., Dissenting)).

The necessity of reviewing a sufficiency of the evidence claim where trial error required reversal has been recognized in this circuit. *See, e.g., United States v. Perez-Reveles*, 715 F.2d 1348, 1355 (9th Cir. 1982); *Kaiser*, 660 F.2d at 730.[3]

In determining the sufficiency of the evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

We first determine whether there was a single overall conspiracy.

A conspiracy is "an agreement to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose and the requisite intent necessary to commit the underlying substantive offense." *United States v. Friedman*, 593 F.2d 109, 115 (9th Cir. 1979). To establish the existence of a single conspiracy, rather than multiple conspiracies, the government must prove that an overall agreement existed among the conspirators. *Bloch*, 696 F.2d at 1215; *Kenny*, 645 F.2d at 1334-35; *United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir.), *cert. denied*, 434 U.S. 971 (1977). The evidence

must show that each of the defendants was involved. *United States v. Clevenger,* 733 F.2d 1356, 1358 (9th Cir. 1984); *United States v. Beecroft,* 608 F.2d 753, 757 (9th Cir. 1979). A formal agreement is not necessary; rather the agreement may be inferred from the defendants' acts pursuant to the scheme, or other circumstantial evidence. *Clevenger,* 733 F.2d at 1358; *United States v. Thomas,* 586 F.2d 123, 132 (9th Cir. 1978). A single conspiracy may involve several subagreements or subgroups of conspirators. *United States v. Tille,* 729 F.2d 615, 621 (9th Cir. 1984).

In this circuit, we have applied a "factors" analysis to distinguish single from multiple conspiracies. *See Tille,* 729 F.2d at 621; *United States v. Zemek,* 634 F.2d 1159, 1168 (9th Cir. 1980), *cert. denied,* 450 U.S. 916, 985, 452 U.S. 905 (1981). The relevant factors include the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals. *Tille,* 729 F.2d at 621.

The evidence established that members of the Coronado Company conspired to import and distribute marijuana from April, 1977, to August, 1981, as alleged in the indictment. Although others were involved in the operation of the Company, the key participants—Villar, Otero, Weber and later Lahodny—remained relatively constant. Likewise, the method of operation throughout remained relatively constant. The contraband was brought by ship to pre-arranged points offshore and was loaded onto small boats for transport to shore. Shipments arrived from time to time during the period charged in the indictment

at widely separated locations (California, Maine and Washington), but the evidence was such that a jury could conclude that there was a continuous far flung operation. The consistency of key personnel and of method and type of operation militates against the separation of these smuggling operations into smaller, independent conspiracies. *United States v. Hinton*, 543 F.2d 1002, 1014 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976), 429 U.S. 1051, 1066, 430 U.S. 982 (1977); *cf. Bloch*, 696 F.2d at 1215 (single conspiracy established by same scheme, same central actors, same activities and same goals).

Given that the Coronado Company engaged in the continuing conspiracy alleged in the indictment, the analysis then focuses on whether Bibbero was a member of the conspiracy. "Once the existence of a conspiracy is established, 'evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight*, is sufficient to convict him with knowing participation in the conspiracy.'" *Abushi*, 682 F.2d at 1293 (quoting *United States v. Dunn*, 564 F.2d 348, 357 (9th Cir. 1977) (emphasis in original)). Specifically, our inquiry is whether the evidence proved that Bibbero's understanding with the Company was of sufficient scope to warrant the conclusion that he embraced the common purpose of the overall conspiracy. *See Thomas*, 586 F.2d at 132. In this determination, the courts rely upon knowledge of and dependency on the enterprise as indicative of that understanding. *United States v. Taylor*, 562 F.2d 1345, 1352 (2d Cir.), *cert. denied*, 432 U.S. 909, 434 U.S. 853 (1977); *see also Kenny*, 645 F.2d at 1335; *Thomas*, 586 F.2d at 132; *Kearney*, 560 F.2d at 1362; *United States v. Baxter*, 492 F.2d 150, 158

(9th Cir.), *appeal dismissed,* 414 U.S. 801 (1973), *cert. denied,* 416 U.S. 940 (1974). In turn, such knowledge and dependency are inferred from specific evidence of the "nature of the criminal enterprise and the defendant's role in it." *Taylor,* 562 F.2d at 1352.

We believe that the jury reasonably could have found that Bibbero was a member of the overall conspiracy. While there is no evidence that Bibbero had any connection with the Company during four earlier shipments alleged in the indictment, the law is well established that "[o]ne may join a conspiracy already formed and in existence, and be bound by all that has gone before in the conspiracy, even if unknown to him." *United States v. Knight,* 416 F.2d 1181, 1184 (9th Cir. 1969); *see also United States v. Jackson,* 627 F.2d 1198, 1212 n.30 (D.C. Cir. 1980). The evidence did establish that Bibbero helped to plan the fifth and sixth smuggling operations and acted as a supplier and distributor of the marijuana. Bibbero's responsibilities placed him at the core of the conspiracy during these two operations. From his position of responsibility, Bibbero undoubtedly understood the full scope of the conspiracy while he was a participant and must have realized that his own profits from the enterprise were dependent upon the success of each off-loading operation.

We conclude that there was sufficient evidence to enable a reasonable jury to find beyond a reasonable doubt that there was a single overall conspiracy and that Bibbero was a member of that conspiracy.

REVERSED AND REMANDED.

FOOTNOTES

1. Evidence of the conversational nature of Vaughan's declaration is provided by Logie's answers to the following series of questions:

Q [D]id any of the things that Mr. Vaughan told you about ownership of the load, at all alter, change, or modify, any of your conduct in reference to the work you did on this particular load?

A Not that I—no.

Q In other words, to you, it was immaterial who owned what was eventually sold of this load. Correct? As far as your job was concerned?

A That's right.

. . . .

Q So who owned the load, who had an interest in the load, who had invested in the load, was irrelevant to any of those conversations as far as you were concerned, correct?

A Yes.

RT: 366-68

Logie further testified that there was a rule that a member of the Company should not communicate information to another member unless it was necessary to further the conspiracy. He then acknowledged that Vaughan's statement was a violation of this rule:

Q And there was a rule in the organization that people weren't told things that were absolutely necessary for their functioning in the organization. Correct?

A That's correct.

Q And so what they called the need-to-know basis?

A Yes.

. . . .

Q So would you say that it was out of the ordinary, then, it was a break with tradition that the rule of the company for David Vaughan to have made the kind of statements he made to you about who was involved in the organization, such as Mr. Bibbero?

. . . .

A Yes, it was.

RT: 484-86

2. On October 13, 1983, after briefs had been filed in this appeal, the government moved to augment the record on appeal to include a "third expurgated version." Defendants opposed the motion, arguing that they had not received the third version during trial. After oral argument, we withdrew the case from submission and remanded it to the district court for the limited purpose of determining whether the government had delivered the third version to defendants during trial. The district court held that there was insufficient evidence to support a finding that defendants had received the third version. The court based its ruling on an affidavit submitted by the prosecutor admitting that he had been mistaken in urging that a copy of the third version had been provided to the defendants. The government then moved to withdraw its motion to augment the record on appeal. On January 23, 1984, we denied the motion to withdraw and granted the motion to augment the record on appeal.

3. We note that *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980) (per curiam), is not inconsistent with our conclusion that we must address a sufficiency claim when we reverse for evidentiary error.

   Harmon addressed the question of whether retrial would be barred if the evidence as submitted was sufficient but would have been insufficient had the improperly admitted evidence been excluded, a question left open by the Supreme Court in *Greene v. Massey*, 437 U.S. 19, 26 & n.9 (1978). We concluded in *Harmon* that an appellate court faced with a sufficiency claim should not be limited to a consideration of only properly admitted evidence. 632 F.2d at 814.

   In *Harmon*, we stated that "the Double Jeopardy Clause does not bar retrial when reversal is based on the improper admission of evidence." *Id.* We do not read this to preclude consideration of the defendant's accompanying sufficiency claim, but rather to require that all evidence adduced at trial be considered in making a sufficiency determination. If all the evidence the government produced at a defendant's first trial, including that which should not have been admitted, is insufficient to support the conviction, then the government has had its proverbial "one bite at the apple" and any retrial would be forbidden.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5073

D.C. #CR 82-572-4-JNK
(S.D. Cal.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RICHARD VIRGIL BIBBERO,

Defendant-Appellant.

(Filed February 8, 1985)

Before: FLETCHER and NELSON, Circuit Judges, and HARDY, District Judge*

Upon due consideration defendant-appellant Bibbero's petition for rehearing is denied.

---

* Honorable Charles L. Hardy, U.S. District Judge for the District of Arizona, sitting by designation.

APPENDIX C

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 8

JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 12

PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

---

21 UNITED STATES CODE ANNOTATED

Section 841(a) (1):

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Section 841(b) (6):

In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph

(1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Section 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 952:

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter...

Section 960:

Unlawful acts

(a) Any person who—

(1) contrary to sections 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance, . . . shall be punished as provided in subsection (b) of this section.

Penalties

* * * *

(b) (2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Section 963:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.